United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

DOCKET NO. 75-7297

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7297

Parents' Committee of Public School 19, et al.,

Plaintiffs-Appellees,

-against-

Community School Board of Community School District No. 14, Board of Education of the City of New York and Irving Anker, as Chancellor,

Defendants-Appellants.

and

Terrel H. Bell, Commissioner of the United States Office of Education,

Defendant.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of New York (the Honorable Jack B. Weinstein). The order was issued on May 19, 1975 and reissued on May 23, 1975, but stayed on that date until September 30, 1975. The Court below issued the order to provide plaintiffs further discovery under Rules 37 and 56(f) of the Federal Rules of Civil Procedure in response to defendants' motion for summary judgment. The appellees are the plaintiffs below and shall be referred to as plaintiffs.

ISSUES PRESENTED FOR REVIEW

I. Does this Court have jurisdiction under 28 U.S.C. §1292(a)(1) to review the order on appeal which was entered pursuant to Rules 37 and 56(f) of the Federal Rules of Civil Procedure?

II. Was the granting of the order on appeal an usurpation of power sufficient to warrant review under a writ of mandamus?

STATEMENT OF FACTS

This lawsuit was filed over a year ago in May 1974. The plaintiffs are 30 Puerto Rican parents and their children who attend P.S. 19 in School District #14 in Brooklyn, New York. The defendants are the members of the Community School Board of District #14, the Community Superintendent William Rogers, the members of New York City Board of Education and Chancellor Irving Anker. At the time the complaint was filed, P.S. 19 had been on split-session for 13 years. The school is 95% Hispanic, the highest concentration of Hispanic school children in the City. As a result of the split-session the plaintiff children were losing an hour a day of school or effectively a day a week of school time. Plaintiffs sued pursuant to the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983, the Civil Rights Act of 1871, and 42 U.S.C. §2000d the Civil Rights Act of 1964 for the discriminatory denial of an equal educational opportunity.[1]

Plaintiffs sought and obtained a preliminary injunction ordering the defendants to provide "remedial and compensatory education, including maximum feasible use of bilingual education" to make up for the loss of school time (JA 110-111). The Court found the discriminatory maintenance of split sessions was in violation of the Fourteenth Amendment:

> I find as a matter of law, that Local School Board 14 is operating in violation of pre-Brown v. Board of Education standards. It is not

1. A copy of the Complaint is included in the Joint Appendix (JA 10-27). (Citations to Joint Appendix shall be "JA" and page number; citations to documents not in the Joint Appendix shall be "R" and the document number in the Index to Record on Appeal.)

> even a separate but equal situation. It is a separate but unequal situation in P.S. 19,... (R. 18 at 136)

Defendants Rogers and the Local School Board submitted a plan to compensate the plaintiffs for the loss of school time. The plan provided for an additional four teachers for the 1,400 children attending P.S. 19.[2] The plaintiffs critiqued the defendants' plan for the lack of any program or structure and for total failure to increase bilingual services for the some 900 children in need of those services.[3] Defendant Anker and the New York City Board of Education did not file a plan until they were ordered again to do so by the Court.[4] Chancellor Anker also criticized defendant Rogers and the local School Board for the failure to provide any specific programatic design, but suggested that his experts would seek to help revise the plan to maximize educational effectiveness. The Chancellor as well as defendants Rogers and the local School Board both alleged that any program for P.S. 19 was necessarily circumscribed by the allocation of the funds to the District.

Over plaintiffs' objections the Court reluctantly accepted the defendants' plan because of the strictures of time and the unavailability of additional resources to provide additional services to the children at P.S. 19. However, the Court ordered that defendants seek additional funds through an application for federal

2. Defendants' plan (R.19).
3. Plaintiffs' critique (R.20 and 21).
4. Anker affidavit (JA 112-117).

Title VII funds for bilingual education, 20 U.S.C. §880b et seq. Elementary and Secondary Education Act.[5] Instead of making an application, defendants made the minimal effort of writing a letter for supplementary funds.[6]

A review of defendants' original Title VII award for the 1974-75 school year revealed that two-thirds of the funds were going to parochial school children in the District - 768 students in parochial schools and 348 students in the public schools were in Title VII programs. This was remarkable since District 14 public schools were almost 60% Hispanic and had the second highest number of children in need of bilingual services in the City. Discovery was later to show that this was the only school district in the country in which more funds or even an equal amount of Title VII funds went to parochial schools.[7]

Plaintiffs amended and supplemented their complaint adding as a defendant Terrel H. Bell, Commmissioner of the United States Office of Education in an attempt to get additional funds to supplement the educational program at P.S. 19. The new complaint alleged that the 1974-75 Title VII grant violated the provisions of Title VII as well as the First and Fourteenth Amendments to the United States Constitution.[8] The plaintiffs' class was amended to include all Puerto

5. Transcript of Hearing October 10, 1974 (R.33 at 36).
6. Letter of Norman Spiegel (R.25).
7. Answers of Defendant Bell to Plaintiffs' Interrogatory No. 8 (JA 395-396).
8. Supplemental Complaint (JA 190-220).

and Hispanic public school children in need of bilingual services in District #14.[9]

Title VII provides that the local School Board, must allow funding agent for all federal funds in the District, must provide for the participation of parochial schools in the bilingual programs, but only to the extent consistent with the number of children who have need of bilingual services because of actual language disability. The applicable statutory provision, which defendants failed to include in their brief, provides in pertinent part that:

> (b) Applications for grants under this subchapter may be approved by the Commissioner only if -
>
> . . .to the extent consistent with the number of children enrolled in non-profit private schools in the area to be served whose educational needs are of the type which this program is intended to meet, provision has been made for participation of such children;...
>
> 20 U.S.C. 880b-(3)(b)(3)(B)[10]

This provision requires that the funds and services sought under Title VII grants be distributed between public and non-public parochial school children in proportion to the number of children in public schools who have need of such bilingual services compared with the number of children in parochial schools who have a similar need.

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9. The class was originally certified as all Puerto Rican and Hispanic parents and their children who have been denied an equal educational opportunity through the maintenance of split-session classes at P.S. 19. Plaintiffs' motion for recertification for a District-wide class is pending before the Court.

10. Title VII was amended by the Educational Amendments of 1974, Pub. L. 93-380 Title I, 105(a)(1), August 21, 1974 88 Stat. 503. The applicable provision, effective July 1, 1975, remains the same and only the section number changes. 20 U.S.C. §880-7(b)(2)(c)(ii).

The gravamen of plaintiffs' supplemental complaint is that a disproportionate number of parochial school children are receiving federal Title VII funds - i.e. the distribution of funds and services is not consistent with the total number of parochial school children with actual language disability. The net result is that public school children are not receiving their rightful share of these federal funds.

The order on appeal to this Court arises out of defendants' (both municipal and federal) motions for summary judgment on the claims raised in the supplemental complaint. Defendants' motions were based in part on their allegations that the 1974-75 Title VII "needs assessment"[11] conducted by defendants identified the number of children in public school in need of bilingual services as 7,659, while the figure for the Hebrew day schools and the Catholic parochial schools was 9,391, and thus, the disproportionate services to the parochial children were justified.

Plaintiffs filed Rule 56(f) affidavits in response to this defendants' motion. These affidavits stated that there was substantial evidence which contradicted the accuracy of defendants' figures and that further discovery was needed to check their accuracy. In the affidavits of Ira S. Bezoza[12] and Patricia Vergata,[13] counsel for plaintiffs, it was alleged that the number of children identified in defendants' needs assessment were inaccurate and that the public school figures and the parochial school figures were not comparable for Title VII purposes, since:

1) included in the need assessment for the Hebrew day

11. "Needs assessment" is the term of art used to mean the identification of children who have limited English speaking ability.

12. JA 400-438.

13. JA 439-448 and Supplementary Affidavit JA 461-501.

school children were at least four schools which were located outside the District.[14] (Defendants in response to plaintiffs' interrogatories in an unverified answer denied knowledge of the actual addresses and suggested plaintiffs rely on a telephone directory);[15]

2) the number of Hebrew day schools varied considerably from the Title VII needs assessment provided by defendants and the number of schools listed in another needs assessment for federal Title I, E.S.E.A. funds. Only 10 Hebrew day schools were listed in the Title I survey while 23 were listed in the Title VII survey;[16]

3) the enrollment figures for several Hebrew day schools in the Title VII needs assessment varied markedly from figures submitted the same year for federal funds under Title I of E.S.E.A.;[17]

4) there was marked discrepancy between the number of children in Hebrew day schools who were allegedly English handicapped and the number of children determined by an independent examiner for Title I purposes to be "achieving below minimal competency." These figures should be comparable since the testing for minimal competency is in English. Nevertheless, in at least 5 Hebrew day schools 50 or less students were determined to be achieving below minimal competency while at the same schools 200-500 children were identified

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14. JA 402-404
15. JA 415
16. JA 404-405
17. For example, the Title I survey listed the enrollments of the following schools as follows: Beth Jacob Elementary, 114; Yeshiva Yesode Hatorah, 217; Beth Rachel School for Girls, 1,686; and Torah of Belz, 238. However, the Title VII needs assessment listed the enrollments as 210; 320; 2025; and 250 respectively. (JA 405).

as having English language handicaps. Two other Hebrew day schools showed even more incomprehensible differences: one varied from 281 identified by the independent examiner for Title I services to 2,444 identified by the school as language-handicapped, the other varied from 297 to 1,418.

5) On the other hand, the figures for public school children varied in exactly the opposite direction - 13,534 were identified as achieving below minimal competency and only 7,659 identified as language handicapped (JA 406);

6) included in the needs assessment for the Hebrew day school children were students in the ninth to twelfth grade as well as post-graduate students while the public school needs assessment included only grades kindergarten through 8th grade (JA 407);

7) finally, the defendants' figures were obtained through differing and subjective needs assessment methods. The public school children included in the Title VII needs assessment were subjectively identified without any test instrument by the homeroom teachers and declared to have either moderate or severe English language handicaps. (JA 415) On the other hand, defendants did not know how the needs assessment was conducted in the parochial schools but alleged that it was done in a comparable manner. Defendants identified Rabbi Naftali Frankel and Sister Filippa Anne Luciano as the persons who conducted the needs assessment in the parochial schools.[18] However, upon deposing Rabbi Frankel, plaintiffs learned that he did not coordinate the needs assessment for the Hebrew day schools and had no knowledge of what was done in the Hebrew day schools other than the one in which he was principal (JA 466).

18. Defendants' answer to Plaintiffs' Interrogatory No. 7 (JA 320-321).

Sister Filippa similarly testified at deposition that she was unable to state what tests were used to identify language handicap in the Catholic parochial schools (JA 465-466).[19] Thus, there was sufficient reason to believe that through obfuscation and subjective testing methods the needs assessment for the parochial schools had been inflated while the needs assessment for public schools had been deflated to justify the disproportionate services provided to parochial school children.

In conjunction with these Rule 56(f) affidavits, plaintiffs cross-moved for additional discovery in respect to this factual dispute and attempt to determine accuracy of defendants' needs assessment. Defendant Anker and the New York City Board of Education, pursuant to a consent decree entered into another case, Aspira of New York v. Board of Education of the City of New York, 72 Civ. 4002 (S.D.N.Y. August 29, 1974) had developed an objective test to determine English language ability. The test, the Language Assessment Battery (hereinafter L.A.B.), was developed to identify students eligible for bilingual education programs and was comprised of three levels of testing depending on the grade level.[20] The L.A.B. was to be given to all Hispanic students and non-English dominant students in the New York City public school system. Plaintiffs by way of a cross-motion pursuant to Rules 33 and 37 proposed that the L.A.B. be given also the parochial school children in District 14. The results of the L.A.B. would provide objective and comparable figures of children in public and parochial schools who are in need of Title VII services and, thus resolve the disputes over the accuracy of defendants 1974-75 needs assessment. Moreover, it would allow the Court to rule on the defendants' summary judgment motions since the factual dispute would be resolved.

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19. Neither of the depositions are part of the record on appeal since deponents have failed to sign and return their copies.

20. The L.A.B. is attached to the Joint Appendix.

At a hearing on April 18th the plaintiffs pressed for a ruling on their cross-motion. Defendants, however, stated that they had conducted their own survey for the 1975-76 Title VII proposal and that this time it was a written test given to both the public and parochial schools.[21] Therefore, the Court ordered the defendants to produce this new needs assessment for plaintiffs as well as the other parts of the Title VII proposal for 1975-76. This information had been previously asked for by plaintiffs, but defendants had refused claiming that the 1975-76 proposal was not before the Court. Judge Weinstein ruled that the 1975-76 proposal was before the Court (JA 452-6) and adjourned plaintiffs' motion until they could see these new materials including the new needs assessment.

Plaintiffs returned to Court on May 9th and again sought a discovery order requiring defendants to administer the L.A.B. in the parochial schools.[22] (The L.A.B. was at that time being administered in the public schools.) The new 1975-76 survey conducted by defendants was as subjective as their past needs assessments.[23] The test was simply two pictures with three questions presumably to be asked to the students (JA 499-501). The same test was given to students from kindergarten through junior high school. There was no sample answers or means of objective scoring. Moreover, before this test was given,

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21. JA 542 at line 11.

22. The transcript for the May 9, 1975 hearing is to a large extent garbled and misreported. The plaintiffs did not receive a transcript until June 19, 1975, and the expedited scheduling of this appeal has made it impossible to prepare a corrected copy. If the Court would like an intelligible record of the May 9th hearing, the plaintiffs will endeavor to produce one in conjunction with the defendants.

23. See Supplementary Affidavit of Patricia Vergata (JA 461-501).

the homeroom teacher selected out a hildren whom it was felt were sufficiently fluent in English, and they were not given the test. Thus, the final figures from the needs assessment were again, as they had been in the past, largely determined by the subjective judgment of the homeroom teacher. Accordingly, the numbers of children determined to have English language difficulty varied substantially from any previous survey.

The defendants' March 1975 needs assessment found only 16% of the public school children were English language handicapped. The figure was not surprising since 84% of the children had been screened out by the homeroom teacher. The 16% figure stood in stark contrast to the previous survey which found 29% of the children in the District with language disabilities (JA 463). In P.S. 19, the figure went from over 800 in June, 1974 to 285 in March, 197[illegible].[24]

The March 1975 needs assessment was further subject to doubt because the survey had been used only in 3 of some 36 Hebrew day schools. The resulting 74 percentile figure was then projected for all Hebrew day school children.

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24. Other public schools also dropped dramatically:

	1973 Language Data Survey	March 1975 Survey
P.S. 17	789 (51%)	250 (28%)
P.S. 84	717 (55%)	357 (34%)
P.S. 196	403 (41%)	203 (23%)
P.S. 250	518 (42.5%)	296 (26%)

(JA 593)

Defendant Rogers and the Local School Board used this subjective test although they were well aware that defendants Anker and the New York City Board of Education had long since discarded this approach in preparing the L.A.B. In October 1974, defendant Anker had rejected a pre-screening method of examination administration for the Aspira language examination (JA 463). Moreover, he and the defendant New York City Board of Education had spent close to one-half of a million dollars developing the L.A.B. so that there would be a comprehensive and objective scoring mechanism and different levels for different grades. The L.A.B. had extensive instructions to provide uniform scoring.

On May 9th, the Court adjourned the defendants' motions for summary judgment and granted plaintiffs' motion for discovery pursuant to Rules 37 and 56(f) of the Federal Rules of Civil Procedure. In doing so the Court sought to resolve the central factual dispute in the lawsuit - the number of children in the public schools and in the parochial schools who have English language deficiencies. When this factual dispute is resolved, the Court will be able to rule on the legal issue of whether the services and funds to parochial school children in the Title VII program are "consistent" with the number of parochial school children, in comparison to the number of public school children, who were in need of bilingual services. Since the L.A.B. had already been given to the public school children, by having it administered in the parochial schools, there would be for the first time an objective needs assessment by which the accuracy of defendants' figures could be judged and the legal issue be resolved.

In making this discovery ruling, the court had before it substantial evidence which placed in doubt the defendants' prior needs assessments. Moreover, the court had before it both the L.A.B., which defendants themselves had developed to be as objective as possible,and the defendants' 3 question test used in March 1975. Finally, since the defendants were the only ones in control of this crucial data, the only way to resolve the factual issue was to require defendants to make this data available. Plaintiffs had through interrogatories and deposition unsuccessfully sought to obtain the truth about the actual needs assessment of the public and parochial school children. Defendants in a unverified response to interrogatories had stated that Rabbi Frankel and Sister Filippa had conducted the 1974-75 needs assessment in the parochial schools. However, upon deposition Rabbi Frankel denied that he had done it, and both he and Sister Filippa were unaware of the methods used to derive the 1974-75 figures. When plaintiffs sought information on the needs assessment for the 1975-76 Title VII grant proposal, counsel for defendants objected and directed the Sister not to answer questions about this at her deposition. It was only through the Court's directive of April 18th that plaintiffs obtained the 1975-76 grant material. But this new material only raised further doubts about previous needs assessments.

After the Court's ruling on May 9, the defendants were allowed to submit further information about any administrative burden in giving the L.A.B. On Monday, May 12, the defendants' counsel notified

plaintiffs that they would be submitting further affidavits. On Friday, May 16th at 4 P.M. the plaintiffs were served with the affidavit of Dr. Anthony Polemeni for the hearing on Monday, May 19th. Plaintiffs requested that Dr. Polemeni be made available for examination on the 19th.

On May 19th, defendants refused to produce Dr. Polemeni.[25] Nevertheless, counsel for plaintiffs, who is employed by the same organization as counsel for plaintiffs in the Aspira case, went forward and rebutted the allegation in Dr. Polemeni's affidavit. Through several computations, Dr. Polemeni had determined the cost of administering the L.A.B. in the parochial schools in District 14 would be $116,000. This figure, as the Court was later to find was "excessive" (JA 583 at line 17).

The largest amount of money that Dr. Polemeni used in calculating the cost was the amount needed to administer the tests. This figure was erroneously based on the premise that the public schools would have to hire personnel to administer the test to the parochial school children. However, the test would in fact be administered by the parochial school personnel just as they had administered the defendants' March, 1975 needs assessment. There would be in fact no cost to the defendants.

Dr. Polemeni also included printing costs of the test booklets and the scoring sheets although these items did not have to be duplicated since the booklets and scoring sheets used in the public

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25. The May 19th transcript, while more intelligible than the one prepared for May 9th, is also incorrect in a number of respects. Again, if the Court desires a corrected version, the plaintiffs will endeavor to produce one.

schools could be collected and used in the parochial schools. There is absolutely no requirement, as defendants state,[26] in the Aspira consent decree that these materials be permanently maintained at the local public schools.[27]

Additionally, Dr. Polemeni used as a base figure 20,000 children as those who were to be given the L.A.B. However, the total number of parochial school children was only 18,000. This 18,000 figure could be reduced even further since there were students included in this figure who were enrolled in schools outside of the District as well as students in pre-kindergarten and grades 9-12 and, therefore, they would not be given the L.A.B. Also almost half of the Catholic parochial school children would not be given the L.A.B. since they were neither Hispanic nor dominant in another foreign language. Plaintiffs estimated that approximately 4,500 students of the 18,000 would have to take the L.A.B.

Also on May 19, the Court granted plaintiffs' leave to file a supplemental complaint to add allegations concerning the 1975-76 Title VII grant proposal. This proposal like the previous one provided for a disproportionate servicing of parochial school children - 881 parochial school children and only 678 public school children.[28] This second supplemental complaint also formally placed before the Court the March 1975 assessment upon which the proposal was based.[29]

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26. Defendants' Brief page 25.
27. The Aspira Consent Decree can be found in the affidavit of Ira Bezoza (R.20).
28. The second supplemental complaint is found at JA 589-596.
29. The court had previously noted that it considered the 1975-76 Title VII grant to be part of plaintiffs' action. (JA 452 at line 6).

In signing the order on May 19, 1975, Judge Weinstein provided for a five day period to allow the parochial schools to appear and contest the order since they in fact would have the burden of administering the test. On May 23, the parochial schools appeared by counsel. They did not oppose the giving of the L.A.B., but claimed that it would interfere at that time in the school year with the giving of final examinations (JA 600-601). After questioning by the Court, both the Catholic parochial schools and the Hebrew day schools agreed to meet with the parties over the summer to resolve any administrative problems which might be involved.

The Court then reissued its May 19th order (JA 611) however postponing implementation until September 30 (JA 605).[30]

Thus, the order on appeal is the Court's order of May 19th as reissued on May 23rd. The order requires defendants to have the L.A.B. administered in the parochial schools in the District 14. The results of the testing will be used to determine the accuracy of the needs assessments for the 1974-75 and 1975-76 Title VII grants. Once this factual issue is resolved, the Court will be in a position to rule on defendants' motions for summary judgment.

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30. The Court further on May 23, 1975 accepted the testimony of Dr. Jose Dones. Dr. Dones had been employed by the defendants as one of their experts to prepare the L.A.B. Dr. Dones' testimony was offered to show that the March, 1975 survey conducted by the defendants was an inadequate instrument for accurately measuring English language deficiency (JA 602-604).

POINT I

THE DISCOVERY ORDER ISSUED BELOW IS NOT APPEALABLE UNDER 28 U.S.C. §1292 (a)(1)

Defendants concede that discovery orders are not appealable under 28 U.S.C. §1292 (a)(1). However, defendants claim that the issuance of the contested order granted, in part, the substantive relief sought by plaintiffs thus representing a partial determination on the merits without the necessary findings required by Rule 52(a) of the Federal Rules of Civil Procedure, and accordingly is appealable. When the same argument was made by counsel for the defendants in an application for certification of the question by the District Court, Judge Weinstein rejected it, stating that this was "[c]learly a discovery problem, it's not an injunction" (JA 582).

While the reviewing court should look to the legal effect of an order and not just to the name given to it by the judge below, United States v. Sisson, 399 U.S. 267, (1970), it should be guided by his stated intention, if the judge could not have "rightly entered" the type of order alleged by defendants. United States v. Weinstein, 425 F.2d 704, 714 (2d Cir. 1971). Judge Weinstein could not have "rightly entered" a preliminary injunction, since there was no determination of the merits, nor were there findings of fact or law as required by the Federal Rules of Civil Procedure 65(d) and 52(a) SEC v. Frank, 388 F.2d 486 (2d Cir. 1968).

Judge Weinstein issued the discovery order on appeal to determine the accuracy of the needs asessment surveys administered by the defendants and resolve the factual issue in this case. The Court was, in fact, willing to accept administration of the LAB not to all the students but to a sample of the parochial school populations (JA 605). Thus, the Court made it abundantly clear to defendants that it was seeking not to supplant the defendants needs assessment but to simply check its accuracy.

> MR. CECERE [counsel for defendants]: Your Honor, just so that I can be clear in my own mind, would the administration of the test be to assess the accuracy and validity of the needs, assessment figures submitted in connection with the 1975-76 grant?
>
> THE COURT: As I understand what the supplemental complaint was to look like, that will be where we are.
>
> (JA 611)

Obviously, the Court had not determined that the language ability tests administered by the defendants were inadequate and was not attempting to grant plaintiffs preliminary injunctive relief under the guise of a discovery order. The Court has simply through its discretionary powers under Rules 37 and 56(f) seeking to resolve the central factual issues in disputes. It is only after the Court has determined the accuracy of defendants' needs assessment and concomitantly the propriety of the allocation of services and funds under Title VII that ultimate relief will issue. The Court clearly has not reached this stage in the litigation. In fact it has adjourned defendants' motion for summary judgment to allow

further discovery in this case.

The defendants argued that if the Court below has exceeded its authority under the Rules, the order in question cannot be treated as discovery and is, therefore, appealable as injunctive relief. However, as will be demonstrated more fully below in Point II, the lower court did not exceed its authority under the Rules. Nonetheless, whether it exceeded its authority or not, a discovery order is not reviewable under 28 U.S.C §1292(a)(1). International Products Corporation v. Koons, 325 F.2d 403, 407 (2d Cir. 1963).

Defendants cite four cases in support of their proposition that this Court should treat the order as injunctive relief and assume jurisdiction under §1292(a)(1). In International Products Corporation v. Koons, supra; Ronson Corporation v. Liquifin Aktiengesellschaft, 508 F.2d 399 (2d Cir. 1974) and Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972) this Circuit held that there was no jurisdiction under §1292(a)(1). As this court stated in International Products Corporation v. Koons, supra at 406:

> [T]he mere presence of words of restraint or direction in an order that is only a step in an action does not make §1292(a)(1) applicable.

The fourth case Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970) is inapposite since preliminary injunctive relief had been granted there giving this Court jurisdiction to review the other non-appealable orders issued in the Court below.

As defendants concede, discovery orders are not appealable under §1292 (a)(1). The facts clearly demonstrate that the instant order is not the granting of preliminary or final injunctive relief. To hold otherwise, would permit plaintiffs to have appealed the denial of their requested discovery motion below. International Products Corporation v. Koons, supra, at 407. Such a result would obviously be "inconsistent with the federal policy of finality." Id.

POINT II

MANDAMUS IS INAPPROPRIATE SINCE THE COURT HAD AMPLE POWER TO ISSUE THE DISCOVERY ORDER ON APPEAL

A. Mandamus Is Justified Only To Correct Judicial "Usurpation of Power"

A writ of mandamus directing the District Court to vacate the discovery order should not be issued, since the court was empowered to enter this order under the Federal Rules of Civil Procedure 37 and 56(f). Mandamus is justified only in those "exceptional circumstances amounting to a judicial 'usurpation of power'...Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382, 74 S.Ct. 145, 147, 98 L.Ed. 106 (1953)." Will v. United States, 389 U.S. 90, 104 (1967); accord United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972). It is not the appropriate remedy to correct errors, even gross and reversible errors, made within the limits of judicial power, Will v. United States, supra; SEC v. Stewart, 476 F.2d 755, 758 (2d. Cir. 1973). Furthermore, in the area of pre-trial discovery, mandamus is rarely allowed. SEC v. Stewart, supra; American Express Warehousing, Ltd. v. Transamerica Insurance Co., 380 F.2d 277, 284 (2d Cir. 1967).

The cases, cited by the defendants, where this Circuit has reviewed a discovery order under its powers of the writ of mandamus are inapposite to the instant appeal. In International Products Corporation v. Koons, supra, an appeal pursuant to 28 U.S.C. §1292 (a)(1) was treated as a motion for leave to file a petition for mandamus. This Court found that the discovery order enjoining

publication or disclosure of various writings obtained prior to the action violated the appellants' First Amendment rights.

In Winters v. Travia, 495 F.2d 839 (2d Cir. 1974), a Christian Scientist plaintiff brought an action to recover damages for the forced administration of medication and a forced physical examination. The lower court ordered the plaintiff to undergo similar physical and mental examinations pursuant to Rule 35, to determine the extent of her injuries. The petition for mandamus was granted because the order ignored the "special" circumstances of the case by directing "some of the same treatment which was the reason for her suit in the first instance." Winters v. Travia, supra at 841.

The defendants also rely on United States v. Percevault, 490 F.2d 126 (2d Cir. 1974). There the lower court issued an order excluding evidence at trial which the government had refused to disclose pursuant to a pre-trial discovery order. This Circuit reversed on appeal and held that the discovery order was prohibited by the Jencks Act, 18 U.S.C. §3500.

The instant order neither violates a constitutional right or a federal statute nor presents such exceptional circumstances as to warrant this Court's intrusion into the course of litigation in the trial court. Defendants have failed to establish "clear[ly] and indisputab[ly]" that this is one of those rare and exceptional situations where a petition for mandamus should be allowed. Bankers Life & Casualty, Co. v. Holland, 346 U.S. 379, 384, (1953).

B. Since The Order On Appeal Was Within the Court's Power Under The Discovery Rules, There Has been No Usurpation of Power

The Court issued a discovery order pursuant to Rules 37 and

56(f) of the Federal Rules of Civil Procedure. The Court acted in response to plaintiffs' affidavits alleging that while there was substantial evidence to place the accuracy of defendants' needs assessment in doubt they had insufficient facts to directly dispute defendants' figures. They proposed that the accuracy of those needs assessments could be ascertained through the administration of the L.A.B., a test developed by defendants themselves. The Court in weighing the burdens on the parties and the clear relevancy of the data sought, ordered the defendants to administer the L.A.B. to the parochial school children.

Under Rule 56(f), a court is given the broad power to permit "discovery to be had" or to "make such other order as is just" should the party opposing a summary judgment motion be in a situation where he "cannot present by affidavit facts essential to justify his opposition." Upon a proper showing based on the affidavits, the trial court is empowered with broad discretion to determine the further course of litigation. It may:"order a continuance to allow the opposing party time to obtain affidavits, take depositions, or otherwise make effective use of the discovery procedures available under the Rules, or make any other order that is just in the particular situation."6 Moore's Federal Practice, ¶56.24 at 2874. Thus, the District Court has ample power to tailor discovery to fit the circumstances of the particular case. Dombrovskis v. Esperdy, 185 F.Supp. 478, 484 (S.D.N.Y. 1960), aff'd on other grounds, 321 F.2d 463 (2d Cir. 1963); Michael Rose Products, Inc. v. Loew's Inc., 141 F.Supp. 257, 263 (S.D.N.Y. 1956).

Moreover, further discovery should always be granted under Rule 56(f) when essential facts are within the exclusive control of the party moving for summary judgment. Thus, it has long been the rule in this Circuit that when defendants move for summary judgment and plaintiffs allege that "the facts are peculiarly in the knowledge of defendants or their witnesses" or that "the facts asserted by the movant are peculiarly within the knowledge of the movant", the plaintiff must be granted the opportunity to develop those facts by use of discovery. Subin v. Goldsmith, 224 F.2d 753, 758-760 (2d Cir. 1955); Dombrovskis v. Esperdy, supra; Krisel v. Duran, 258 F.Supp. 845, 861 (S.D.N.Y. 1966), aff'd on other grounds 386 F.2d 179 (2d Cir. 1967); See generally, 6 Moore's Federal Practice, ¶ 56.27 at 2875.

The granting of further discovery under Rule 56(f) in these circumstances was more recently reaffirmed by this Circuit:

> The district court's grant of summary judgment against the plaintiff was accompanied by a refusal of his request for discovery. This court has indicated that summary judgment should be rarely be granted against a plaintiff in a stockholder's derivative action especially when the plaintiff has not had an opportunity to resort to discovery procedures. See, for example, Subin v. Goldsmith, 224 F.2d 753 (2d Cir.), cert. denied, 350 U.S. 883 76 S.Ct. 136, 100 L.Ed. 779 (1955); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948). The plaintiff typically has in his possession only the facts which he alleges in his complaint.... Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plain-

tiff the possibility of counteracting the effect of defendants' affidavits.

Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir.) (en banc), cert. denied 395 U.S. 906 (1969)

Plaintiffs in the instant case are in a similar situation. Defendants moved for summary judgment alleging the accuracy of their distribution of federal funds as between parochial and public school children. Plaintiffs requested further discovery under Rule 56(f), offering substantial evidence which called into question the accuracy of defendants' needs assessment and pointing out that defendants themselves control the method of assessing the accuracy of the figures they allege in support of their motion. The dependence of the plaintiffs in this case on methods for developing essential facts that are under the exclusive control of the defendants requires that further discovery be granted the plaintiffs to develop those facts under Rule 56(f). The Court faced with the peculiar circumstances of the case fashioned the only discovery order that would enable him to clarify the essential facts of the case and thus enable him to decide the motion before him.

Furthermore, the District Court had independent legal authority flowing from Rules 26, 33 and 37 of the Federal Rules of Civil Procedure to grant the order on appeal requiring the Administration of the L.A.B. to ascertain and identify the incidence of language disability in the parochial school population so as to resolve the primary issue before the court. The discovery provisions of the Rules are to be liberally construed to permit for the narrowing of the factual disputes in issue to reduce the amount of litigation which would require

a trial. Hickman v. Taylor, 329 U.S. 495 (1947); Leumi Financial Corp. v. Hartford Accident & Indemnity Co., 295 F.Supp. 539, 543 (S.D.N.Y. 1969).

Substantial authority for Judge Weinstein's order is found in an analagous case Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y. 1971), aff'd. 458 F.2d 1167 (2d Cir. 1972). There Judge Mansfield, sitting then in the Southern District, ordered the defendants to conduct a survey of the racial and ethnic statistics of some 6,201 persons who had taken 50 supervisory examinations over a period of seven years and to compile their comparative pass rates. This discovery order was issued to avoid the "endless delay that would be encountered while the parties obtained this essential evidence through pretrial discovery procedures. Id. 330 F.Supp. at 209.

Other courts when faced with employment discrimination cases have required employers to compile statistical data not based on existing records. In United Construction Workers Association v. Brennan, 9 EPD ¶¶ 9843, 9844 (W.D. Wash. 1974), plaintiffs commenced an action charging, inter alia, that the Department of Labor failed to discharge its responsibility to insure compliance with the equal

opportunity and affirmative action provisions of Executive Order No. 11246 in the Seattle-King County construction trades. After pre-trial conferences, the district court concluded that to answer this fundamental factual question required the development of statistical data determining the number of minority man-hours in the construction trades: Accordingly, the Court issued a discovery order directed to the defendant Department of Labor requiring the compilation of this data, including a decretal paragraph that the defendant "will consult with all likely sources of the information required, including union, management, local, state and federal government sources."

In EEOC v. Hickey-Mitchell Co., 372 F.Supp. 1117 (E.D. Mo. E.D. 1973) rev'd on other grounds, 507 F.2d 944 (8th Cir. 1974), the EEOC sought a discovery order compelling the answer to interrogatories requesting the racial classification of the work force to which defendants had responded that their records do not classify employees according to their race. The lower court granted the application stating:

> [d]efendant should seek the required answers by whatever reasonable means are available, e.g. personal observation and recollection, if corporate records are inadequate. 372 F.Supp. at 1122.

Similarly, courts have required the compilation of data not readily available. In Circle K Corporation v. EEOC, 501 F.2d 1052 (10th Cir. 1974), the EEOC appealed the district court's denial of enforcement of an administrative Demand for Access to

Evidence requesting information, including inter alia the racial-ethnic identity of the work force, necessary and material to investigate an allegedly discriminatory hiring practice. The district court, 7 EPD ¶9425 (D.N. Mex. 1972), had ruled that the Demand had been too burdensome in that it required a compilation of facts and materials not readily available. The Tenth Circuit reversed holding that the information sought was material and thus could not be denied on the basis that compliance would be unduly burdensome. 501 F.2d at 1055.

In New Orleans Public Service, Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975), the EEOC appealed the determination of the trial court which had, in pertinent part, quashed an administrative subpoena duces tecum, requesting inter alia, racial ethnic classifications, on the grounds that it required the employer to assemble and compile data on an immense expense in terms of money and time. 369 F.Supp. 702 (E.D. La. 1974). The Circuit Court reversed and held that the defendant employer could be required to make the compilations and that the trial court was in error in limiting the right of EEOC to obtain information which

already had been compiled. 507 F.2d at 164-165.[31]

Furthermore, the instant order was clearly a proper use of judicial power where the information sought is within the unique ability of the defendant to gather and compile. In King v. Georgia Power Co., 50 F.R.D. 134 (N.D.Ga. 1970), a civil rights action challenging hiring and promotion practices, plaintiffs served interrogatories requesting detailed information with respect to lines of progression and the seniority system with respect to employees of the plant on two different dates. Defendant responded by producing a copy of the collective bargaining agreement and a list of the current employees with the statement that most of them were at the plant at the earlier date. Plaintiffs served a second set of interrogatories requesting defendants to

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31. The fact that these rulings have emanated from EEOC administrative investigations and litigation under Title VII does not negate or limit their applicability to the instant matter. The Court in Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305, (5th Cir. 1973), ruling that interrogatories by private party plaintiff in a Title VII suit, requesting name, age, sex, race classifications, seniority and educational background of employees at defendant's plant, are discoverable, notwithstanding claim of burdensomeness, declared:

> [a]ny information relevant - in a discovery sense - to an EEOC investigation is likewise relevant to the private attorney-general, either in his individual role or in his capacity as the claimed representative of a class.

See e.g. New Orleans Public Service, Inc. v. Brown, supra, 507 F.2d at 165.

detail the application of the collective bargaining agreement to which defendant objected on the grounds that it was repetitious of the first set of interrogatories. In overruling this objection, the Court stated, 50 F.R.D. at 136:

> Although preparation of a direct answer will be time-consuming, and probably costly, the information is crucial to the issues of this suit, and is in exclusive custody of the defendant.

Indeed, Chance and the other cases cited above, represent a decisional trend, consonant with the liberal interpretation of the Rules, to compel discovery where the court views the response as relating to the crucial issue of the litigation. This is particularly the case in civil rights litigation where the courts have consistently depended upon statistical data to resolve the merits of the action. Alabama v. United States, 304 F.2d 583 586 (5th Cir.) aff'd 371 U.S. 37 (1962). The instant order represents an attempt to procure the necessary data to resolve the underlying legal issues raised by plaintiffs' complaint.

This liberal use of discovery is reflected in Morales v. Turman, 59 F.R.D. 157 (E.D. Tex. 1972). Plaintiffs there claimed that juvenile confinement facilities violated their constitutional rights. In response to plaintiffs' discovery request, the court ordered defendants to allow plaintiffs' experts to reside in the institution for one month's observation. Over defendants' objections of cost and disruption, the Court stated:

> "When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding

process available to counsel
for both sides."

59 F.R.D. at 159

Plaintiffs in the instant case have raised the paramount constitutional issue of violation of the Establishment Clause of the First Amendment by the disporportionate participation of parochial school children in federally funded programs for special education. Such an allegation raises serious constitutional questions. Meek v. Pittenger _____U.S._____ (1975); 43 U.S.L.W. 4596 (May 19, 1975). The Court's order in the instant case represents the use of the discovery rules to reach the truth by clarifying the essential facts underlying the First Amendment and statutory claims of disproportionate funding.

C. There Is No Financial Burden On Defendants

Defendants seek the writ of mandamus by claiming that the order unduly financially burdens them and secondly that it cannot be implemented since the parochial schools are not under their control. These are matters solely within the discretion of the trial court in weighing the relevance of the data sought with the burden on the parties before issuing its discovery order. Even gross error in these discretionary decisions would not be sufficient to warrant the issuance of the writ of mandamus. Will v. United States, supra. However, both these issues were subject to a hearing before Judge Weinstein and determined not to outweigh the clear relevance of the discovery sought, see, Burns v. Thiokol Chemical Corp. supra.

The court determined that defendants' estimates of financial burdens in administering the L.A.B. were "excessive" (JA 583 at line 17). This determination was within the discretion of the court and not in excess of its powers under the Federal Rules of Civil Procedure.

D. The Defendants Have The Power To Obtain The Data Sought

The claim that the parochial schools are not under the contract of defendants is clearly belied by the fact that these schools have in the past conducted needs assessments for the defendants. Furthermore, both the Hebrew day schools and Catholic parochial schools indicated that they were willing to administer the L.A.B. under the proper circumstances. (JA 600-601).

The defendants' contention that to implement the Court's order would require the acquiescence of a third party not under their control or parties to this lawsuit, and thus, in excess of the Court's judicial function is also legally unsupportable. Title VII requires that children attending parochial schools in the school district applying for federal funds participate in the educational program consonant with their demonstrated proportional needs. 20 U.S.C. §880b-(3)(b)(3)(B). The local school district is thus required, pursuant to the federal regulations, 45 C.F.R. §123.14 and §123.15, to ascertain the number of parochial school of children of limited English speaking ability. Assuredly, if the parochial schools refused to cooperate with local school officials to identify the incidence of language disability in their school's student population, their participation in the

program would be impossible, if not illegal. In fact, failure to cooperate and while participating in a Title VII program may result in possible First Amendment violations (JA 605). Accordingly, the parochial schools may not be represented to be disinterested third parties over whom the defendants exercise no control.

It is a general principal that interrogatories may properly be addressed to a corporate party which seeks information which is in the possession of a subsidiary of that named party. As stated in Erone Corporation v. Skouras Theatres Corp., 22 F.R.D. 494, 498 (S.D.N.Y. 1958):

> [i]f subsidiaries or controlled corporations possess the desired information and defendants' control over them is such that the information is 'available' to defendants, defendants may not refuse to answer because the source of the information is a separate corporate entity. If the information sought is not 'available' to defendants, they may so state.

Accord, Greenbie v. Noble, 18 F.R.D. 414 (S.D.N.Y. 1955); Sol S. Turnoff Drug Distributors, Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 55 F.R.D. 347, 349 (E.D.Penn. 1972).

In United Construction Workers Association v. Brennan, supra, the Department of Labor made the same argument as defendants herein-viz., that without the cooperation of the unions it would be impossible to gather the information required by the discovery order. With respect to the power of the Department to require the divulgence of information, the Court stated:

> The Court cannot accept on the present showing the conclusion that the Department of Labor has exhausted its information gathering resources without procuring the information required.

> Furthermore, the discovery procedures made available through the federal rules have not as yet been invoked
>
> 8 EPD ¶9844 at 6508

Defendants have not, and cannot, make a showing that the information is not 'available' nor that they have exhausted all efforts to gain the information sought. Accordingly, the discovery order on appeal cannot be claimed to be an usurpation of judicial power on this ground.

The implementation of the District Court's order has been left to negotiation between plaintiffs, defendants and the parochial schools (JA 605). If defendants are unable to comply with the order, then proper recourse would have been to seek a motion for a protective order, not to seek the review of this Court.

Mandamus should not issue, for there has been no showing of even an abuse of discretion much less "usurpation of power":

> Will v. United States, 389 U.S. 90, 95, 104, 88 S.Ct. 269, 273, 278, 19 L.Ed. 2d 305 (1967), makes plain that mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of a writ. "While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction', it is clear that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy...Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors'. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 74 S.Ct. 145, 147, 98

L.Ed. 106 (1953). Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power. Id., at 383, 74 S.Ct. 148".... The Court had said long before that the all-writs statute, 28 U.S.C. §1651(a), cannot "be availed of to correct a mere error in the exercise of conceded judicial power," but can be used only "when a court has no judicial power to do what it purports to do - when its action is not mere error but usurpation of power..." DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566 (1945).

United States v. DiStefano, supra 464 F.2d at 850 (2d. Cir. 1972)

CONCLUSION

For all the reasons stated above, plaintiffs respectfully request that this appeal be dismissed with costs for lack of jurisdiction and that the defendants' petition for a writ of mandamus be denied.

Dated: New York, New York
July 3, 1975

Respectfully submitted,

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*Counsel for plaintiffs wish to extend their appreciation to Idelisse Malave, student at Columbia Law School, for her assistance on this brief.

CERTIFICATE OF SERVICE BY MAIL

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